Ng Khai Wei v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–106 OF 2009
HASAN LAH, ABDUL MALIK ISHAK AND BALIA YUSOF JJCA
27 DECEMBER 2011

Criminal Procedure — Defence — Failure to mention material part of defence at earlier stage — Accused on drug trafficking charge claimed drugs in car belonged to passenger — Allegation not raised either in statement to police after arrest or during cross-examination of prosecution witnesses — Allegation raised for first time during defence's case — Whether accused's credibility and weight to be attached to his evidence affected

The appellant ('accused') was convicted and sentenced to death by the High Court for trafficking in 77.3g of dangerous drugs comprising 42.9g heroin and 34.4g monoacetylmorphines contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952. According to the prosecution's evidence, police acting on a tip-off had followed a car owned and driven by the accused from a rest area along the North-South Highway until it reached a toll plaza. The accused was the only person in the car. When he reached the Touch 'n Go booth at the toll plaza the police stopped the car and arrested the accused. They found the drugs in a plastic bag in the car. In his defence, the accused denied knowledge of the drugs saying another person named Ting See Wah had been in the car with him earlier in his journey. In his appeal to the Court of Appeal against conviction and sentence the accused said the trial judge erred in finding he had knowledge of the drugs in the car and in not giving due consideration to the defence's evidence. The accused said at most he could only have had custody and control of the drugs but not knowledge because the inference of knowledge could not be based on the mere fact he was driving alone at the material time. He also said the existence of a Touch 'n Go card belonging to one Ting See Wah in the car proved the latter was not a fictitious person.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) Knowledge was a matter of inference from the whole surrounding circumstances and facts of the matter. The trial judge fully appreciated the facts and circumstances in concluding the accused had custody and control of the drugs and rightly drew an inference he had knowledge of the same. There was nothing inherently erroneous in his finding and there was no reason to disturb the same (see paras 13 & 16).

(2) While it was true that Ting See Wah was not a fictitious person, his name was never mentioned during the prosecution's case except for the fact the

Touch 'n Go card found in the car belonged to a person by that name. The arresting officer was never cross-examined about this person. It was not suggested to him that Ting See Wah was with the accused in the car prior to his arrest. No reference to that person was also made in the accused's statement to the police. The defence that the drugs were left in his car by Ting See Wah arose only during the defence's case (see para 21).

(3) The finding of the Touch 'n Go card in the name of Ting See Wah by no means proved that that person was in the car with the accused. Anyone could use anyone else's Touch 'n Go card without the owner of the card being present. The defence's failure to put its case to material prosecution witnesses at an early stage during the prosecution's case had serious implications on the accused's credibility and the weight to be attached to his evidence (see para 21).

(4) The trial judge was right in concluding the defence had failed to cast a reasonable doubt on the prosecution's case and that the prosecution had proved its case beyond reasonable doubt (see para 24).

[Bahasa Malaysia summary

Perayu ('tertuduh') disabitkan dan dihukum mati oleh Mahkamah Tinggi bagi pengedaran 77.3g dadah berbahaya yang mengandungi 42.9g heroin dan 34.4g monoacetylmorphines bertentangan dengan s 39B(1)(a) Akta Dadah Berbahaya 1952. Menurut keterangan pihak pendakwaan, polis yang bertindak atas maklumat telah mengikuti sebuah kereta yang dimiliki dan dipandu oleh tertuduh daripada kawasan rehat yang terletak di Lebuhraya Utara-Selatan sehingga ia tiba di plaza tol. Tertuduh merupakan satu-satunya orang di dalam kereta. Apabila dia sampai di pondok Touch 'n Go di plaza tol, polis memberhentikan kereta tersebut dan menangkap tertuduh. Mereka menemui dadah di dalam beg plastik di dalam kereta tersebut. Di dalam pembelaannya tertuduh menafikan pengetahuan tentang dadah tersebut dengan menyatakan seorang yang bernama Ting See Wah telah berada di dalam kereta tersebut bersamanya sebelum itu dalam perjalanannya. Di dalam rayuannya kepada Mahkamah Rayuan terhadap sabitan dan hukuman tertuduh menyatakan bahawa hakim perbicaraan terkhilaf dalam penemuannya bahawa dia mempunyai pengetahuan tentang dadah di dalam kereta dan tidak memberikan pertimbangan yang sewajarnya kepada keterangan pembelaan. Tertuduh menyatakan bahawa dia hanya mempunyai milikan dan kawalan dadah tersebut tetapi bukan pengetahuan kerana inferens pengetahuan tidak boleh didasarkan atas fakta dia sedang memandu berseorangan pada masa material semata-mata. Dia juga menyatakan bahawa adanya kad Touch 'n Go kepunyaan Ting See Wah di dalam kereta tersebut membuktikan bahawa dia bukan orang yang direka.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Pengetahuan adalah perkara yang disimpulkan daripada keseluruhan

keadaan sekeliling dan fakta perkara tersebut. Hakim perbicaraan telah secara menyeluruh menilai fakta dan keadaan sekeliling dalam memutuskan tertuduh mempunyai kawalan dan milikan dadah dan dengan betul membuat inferens dia mempunyai pengetahuan tentang dadah tersebut. Tidak ada apa-apa kesilapan di dalam penemuannya dan tidak ada alasan untuk campur tangan dengan penemuan itu (lihat perenggan 13 & 16).

(2) Walaupun ia adalah benar bahawa Ting See Wah bukanlah orang yang direka, namanya tidak pernah dinyatakan semasa kes pihak pendakwaan kecuali bagi fakta bahawa kad Touch 'n Go yang ditemui di dalam kereta adalah kepunyaan seorang dengan nama itu. Pegawai yang menangkap tidak pernah disoal-balas mengenai orang ini. Ia juga tidak disarankan kepadanya bahawa Ting See Wah ada bersama tertuduh di dalam kereta sebelum penangkapannya. Tidak ada rujukan kepada orang tersebut yang dibuat di dalam kenyataan tertuduh kepada polis. Pembelaan bahawa dadah tersebut ditinggalkan di dalam kereta oleh Ting See Wah timbul hanya semasa kes pembelaan (lihat perenggan 21).

(3) Penemuan kad Touch 'n Go atas nama Ting See Wah tidak membuktikan bahawa orang itu berada di dalam kereta bersama dengan tertuduh. Sesiapa pun boleh menggunakan kad Touch 'n Go orang lain tanpa kehadiran pemiliknya. Kegagalan pembelaan mengemukakan kesnya kepada saksi-saksi material pihak pendakwaan di peringkat awal kes pihak pembelaan mempunyai implikasi yang serius terhadap kebolehpercayaan tertuduh dan beban yang boleh diletakkan kepada keterangannya (lihat perenggan 21).

(4) Hakim perbicaraan adalah betul dalam memutuskan bahawa pembelaan telah gagal meletakkan keraguan yang munasabah ke atas kes pihak pendakwaan dan bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan yang munasabah (lihat perenggan 24).]

Notes

For a case on failure to mention material part of defence at earlier stage, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 1923.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359, HC (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)
Megat Halim Megat bin Omar v PP [2008] MLJU 647; [2009] 1 CLJ 154, CA (refd)
Mohd Hazrin bin Md Sari v PP [2008] 6 MLJ 19; [2008] 5 CLJ 362, CA (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)

A *PP v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Dato' Seri Anwar Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Lim Hock Boon [2009] 3 MLJ 604; [2009] 3 CLJ 430, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

B **Legislation referred to**
Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a), (2)

Appeal from: Criminal Trial No 45–40 of 2004 (High Court, Kuala Lumpur)

C *Mohammad Rafique (Law Practice of Rafique) for the appellant.*
Mohamad Abazafree bin Mohd Abbas (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Balia Yusof JCA:

D

[1] The appellant was convicted for the offence of trafficking in dangerous drugs in that on 22 July 2003 at about 11.15pm at the Plaza Tol Ipoh-Kuala Lumpur, Jalan Duta, Kuala Lumpur he did traffic in 77.3g of dangerous drugs comprising of 42.9g of heroin and 34.4g of monoacetyl morphines an offence
E under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the same Act.

FACTS

F

[2] On 22 July 2003 at about 5pm, DSP S Batumalai a/l Suppiah ('SP4') received an information regarding a drug trafficking activity involving a car coming to Kuala Lumpur via the North-South Highway. A briefing was held at the Narcotics Office in Bukit Aman involving personnel from the Jabatan
G Siasatan Jenayah Narkotik Bukit Aman.

[3] The briefing ended at about 6pm and SP4 and his team proceeded to the Sungai Buloh rest area of the North-South Highway southbound. The team comprised of three groups with SP4 leading the first group, ASP Ng Kong Soon
H and ASP Howe Sye Eng leading the second and third groups respectively.

[4] After waiting for about 1 1/2 hours at the said place, at about 9.30pm SP4 saw a grey coloured Proton Wira Aeroback with registration No PFK 2063 coming from the north with only the driver at the wheel. SP4 instructed his
I team to follow the said car. SP4 also tailed the said car until it reaches the Jalan Duta Toll Plaza. When the said car stopped at the Touch' n Go booth, SP4 got out of his car and asked the driver of the said car to come out and was then arrested by one Ahmad Daud. SP4 then drove the said car to the car park area exiting the toll booth using the Touch'n Go card found in the same.

[5] On examining the said car, SP4 found a plastic bag marked 'SOGO' on the floor board behind the front passenger seat and upon a closer examination of the same some substances believed to be drugs were found in another plastic bag marked 'Hall of Jeans'. A pair of shorts and a white shirt were also found. SP2, the government chemist, confirmed that the substances found in the plastic bag is a mixture containing 42.9g of heroin and 34.4g of monoacetyl morphines giving a total weight of 77.3g. Police investigations also revealed that the said car PFK 2063 belongs to the appellant.

[6] At the trial before the learned judicial commissioner in the High Court, evidence were led by the prosecution through seven witnesses at the end of which the learned trial judge found that a prima facie case had been established and the appellant was called upon to enter his defence.

THE DEFENCE

[7] In his defence, the appellant elected to give evidence on oath without calling any other witness. He denies any knowledge about the drugs found in the car. According to him he was going to Kuala Lumpur with one Ting See Wah who had alighted from his car and went into another car somewhere near Rawang with two other persons in it whom he does not know. He was arrested by the police when he was driving alone to Kuala Lumpur.

[8] The learned trial judge found the appellant guilty as charged and sentenced him to death. Against the said conviction and sentence, the appellant appealed.

THE APPEAL

[9] Learned counsel for the appellant raised two issues before us in contending that the conviction recorded against the appellant is not sustainable in law. Firstly, it is contended that the learned trial judge has erred in failing to make a finding that there was knowledge on the part of the appellant in respect of the offending drugs found in the car driven by the appellant. Secondly, it is further contended that the dismissive nature of the trial judge's treatment of the appellant's evidence in defence is prejudicial to the appellant and thus it is unsafe to uphold the conviction.

[10] On the first issue of knowledge, the appellant's counsel submits that the learned judicial commissioner's full reliance on the decision of the Federal Court in *Public Prosecutor v Lim Hock Boon* [2009] 3 MLJ 604; [2009] 3 CLJ 430 is misplaced.

[11] In attacking the learned judicial commissioner's finding of knowledge,

learned counsel has chosen to single out para 18 at p 115 of the appeal record to illustrate the learned judicial commissioner's erroneous finding of knowledge on the part of the appellant. Paragraph 18 of the judgment merits reproduction and it reads as follows:

> Oleh kerana dadah telah ditemui daripada beg 'SOGO' yang ditemui daripada kereta PFK 2063 yang dipandu OKT seorang diri semasa ditahan, maka inferen yang boleh dibuat adalah OKT punya pengetahuan akan dadah yang ditemui daripada beg 'SOGO' tersebut dan dengan itu OKT punya 'mens rea possession' akan dadah yang ditemui itu.

[12] At most, according to learned counsel, the above passage merely goes to prove custody and control but not knowledge. An inference of knowledge cannot be drawn from the mere fact that the appellant was driving alone at the time of the arrest.

[13] We are unable to agree with learned counsel's argument. Knowledge is always a matter of inference from the whole surrounding circumstances and facts of the matter. It serves really no useful purpose for us to cite the plethora of authorities on this issue. Suffice for us to state that the learned judicial commissioner was fully appreciative of the facts and circumstances in coming to the conclusion that the appellant had custody and control of the drugs and rightly drew an inference that he had knowledge of the same (see *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717, *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337).

[14] At pp 11–113 of the appeal record, the learned judicial commissioner stated:

> Keterangan daripada saksi pasukan serbuan jelas menunjukkan hanya OKT seorang diri yang berada dalam kereta semasa kereta dilihat pertama kalinya di tempat rehat Sungai Buloh dan di sepanjang perjalanan intipan. Kereta tidak berhenti untuk mengambil atau menurunkan penumpang. Ini bermakna hanya OKT yang berada seorang diri dalam kereta PFK 2063. Semasa kereta diperiksa pertama kalinya keadaan kereta berkunci dan hanya OKT yang berada dalam kereta. Oleh itu, dadah yang terdapat dalam beg 'SOGO' pada sepanjang masa material berada dalam jagaan dan kawalan OKT.

[15] Having so found and taking into account the combined weight of the drugs being 77.3g, the presumption under s 37(da) of the Act was invoked.

[16] Although the learned judicial commissioner did not say it in crystal clear words, we are appreciative of the fact that he has considered the combined effect of all the surrounding circumstances and the cumulative force of the facts

adduced before him. We are of the view that the judicial commissioner has rightly applied and followed the principles enunciated in *Public Prosecutor v Lim Hock Boon*.

[17] We do not find anything inherently erroneous with his finding and neither do we have any reason to disturb the same.

[18] For the aforesaid reason we found no merit in the appellant's objection on this ground.

[19] Moving on to the second ground of the appellant's appeal, his main complaint in effect is that the learned judicial commissioner has failed to give due consideration to the defence evidence.

[20] For a start, we observed that the learned judicial commissioner has spent a good part of his judgment considering the evidence given by the appellant in his defence. Starting from para 25 right to para 28 of the judgment seem to us to be a consideration by the learned judicial commissioner of the defence and from para 29 onwards till the end of the judgment set out the observation, analysis and consideration by him of the same. The learned judicial commission concluded his analysis of the defence evidence by stating amongst others:

> Setelah mendengar, menilai dan menimbangkan keseluruhan keterangan pembelaan, saya dapati dan putuskan keterangan OKT amat dangkal, tidak munasabah dan sukar dipercayai.

and goes further in the following paragraphs of his judgment stating his reasons for concluding as such. In essence, the defence put up by the appellant is one of denial.

[21] We have given our anxious consideration of learned counsel's submissions on this issue but found ourselves unpursuaded by his arguments. While it is true that Ting See Wah is not a fictitious person, we agree with the learned judicial commissioner's finding that the name Ting See Wah was never mentioned or raised during the prosecution's case except for the fact that the Touch 'n Go card found in the car belonged to one person by the name of Ting See Wah. We would have thought that especially during the cross-examination of SP4 and SP6 would be the opportune moment for the appellant to suggest the line of defence he would be adopting. However that was not the case. The defence that the drug was left in his car by Ting See Wah arises only during the defence case. The arresting officer, SP4 was never cross-examined at all about this person. Neither was it suggested to this witness that Ting See Wah was with the appellant in the said car prior to his arrest. In our view, the finding of the said Touch 'n Go card registered in the name of Ting See Wah by no means

prove that the said Ting See Wah, however real that person may be, was in the car with the appellant. The evidence of SP5 suggests that anybody can use anybody else's Touch 'n Go card without being physically present or personally using the card. In the circumstances, we do not find anything objectionable about the judicial commissioner's comment on the defence put forth by the appellant to be 'amat dangkal, tidak munasabah dan sukar dipercayai'.

[22] It is trite that the defence should be put to the prosecution at an early stage during the prosecution's case. Although failure on the part of the defence to put its case to material prosecution's witness can never by itself relieve the prosecution of its duty to prove the charge against the accused beyond reasonable doubt (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209), such failure by the defence does have serious implication on the accused's credibility and the weight to be attached to his evidence. Failure to do so may also move the trial court to dismiss a particular line of defence as an afterthought or as a recent invention (see *Megat Halim Megat bin Omar v Public Prosecutor* [2008] MLJU 647; [2009] 1 CLJ 154). It is also wrong to think this is merely a technical rule of evidence. It is a rule of essential justice (see: *AEG Carapiet v AY Derderian* AIR 1961 Cal 359, *Public Prosecutor v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1, *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212).

[23] In the same token, while it is also true that the appellant is under no duty to make any statement whether cautioned or otherwise to the police and no adverse inference may be drawn against him for such failure (see *Mohd Hazrin bin Md Sari v Public Prosecutor* [2008] 6 MLJ 19; [2008] 5 CLJ 362) one would expect that the appellant had his first opportunity when his statement in exh D31 was made. But in exh D31 the appellant denied any knowledge about the bag containing the drugs. The appellant merely stated:

> Saya tidak tahu beg itu ada apa barang. Polis cakap beg itu ada dadah heroin. Itu dadah bukan saya punya dan saya tidak tahu itu dadah siapa punya.

[24] In this instance, we agree with learned deputy's submission that in carrying out the maximum evaluation of the evidence and in considering whether the appellant has on the balance of probabilities rebutted the presumption under s 37(da) of the Act and cast a reasonable doubt on the prosecution's case, the learned judicial commissioner must consider and indeed has considered this aspect of the defence evidence. Having considered the defence evidence and upon testing it with the evidence of the prosecution's witness, the learned judicial commissioner was right in concluding that the defence has failed to cast a reasonable doubt on the prosecution's case. Consequently, the prosecution has proved its case beyond reasonable doubt.

[25] As a trial judge of first instance and a trier of facts the learned judicial commissioner has had the advantage of seeing and hearing the witnesses in the discharge of his judicial function of appreciating and appraising all the relevant evidence before him in arriving at his decision. It would not be out of place for us to remind ourselves of a passage quoted from the judgment of His Lordship Gopal Sri Ram JCA (as he then was) in *Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin & Anor* [2003] 2 MLJ 97 at p 116 which states:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[26] Upon our perusal of the records, we are satisfied that the learned judicial commissioner has accordingly discharged that function.

[27] For the aforesaid reasons, it is our unanimous decision that this appeal is without any merit and it is hereby dismissed. The conviction and sentence imposed by the High Court are hereby affirmed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar